IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATTHEW J. MCAVOY, Plaintiff, v. MICHAEL S. VANGAVREE, AFFINITYLTC, LLC Defendants.	: : : : : : : : : :	ELECTRONICALLY FILED NO. 1:17-CV-00064-JEJ (Judge John E. Jones III)

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COUNT III OF PLAINTIFF'S COMPLAINT

INTRODUCTION

Plaintiff Matthew J. McAvoy's claim for unjust enrichment against defendants Michael S. VanGavree and AffinityLTC, LLC ("AffinityLTC") should be dismissed. The claim against VanGavree fails because VanGavree does not dispute the existence or validity of the contracts at issue, which means that a claim for unjust enrichment is not viable. The claim against AffinityLTC fails for two reasons: (1) McAvoy lacks standing to sue because the alleged injuries were primarily sustained by Target of Pennsylvania, LLC ("TISP"); and (2) the lack of standing aside, McAvoy fails to state a plausible claim.

McAvoy's arguments in opposition do not save his claims. The Court should reject those arguments for the following five reasons:

1. McAvoy relies on general pleading rules that permit alternative causes of action. But the right to plead an unjust enrichment claim in the alternative is not unconditional; an alternative unjust enrichment claim cannot be alleged when the rights at issue arise from contracts, the existence and validity of which are not in dispute.

2. McAvoy now suggests that the contracts may not apply to all of the "transactions." But McAvoy did not plead that his unjust enrichment is premised on extra-contractual rights, and even if he had, the claim would not be plausible.

3. Without citing any authority, McAvoy asserts his claim also survives because VanGavree admits to the contracts for the first time in the motion to dismiss. But it is well-settled that admitting to the existence and validity of the contracts in a pre-answer motion to dismiss is sufficient to defeat an "alternative" unjust enrichment claim.

4. Although McAvoy clarifies his allegations against AffinityLTC, the clarification does not save his claim. He still lacks standing to sue AffinityLTC directly because his injuries remain derivative of injuries allegedly suffered by TISP.

5. Finally, McAvoy's claim that he indirectly conferred benefits on AffinityLTC stretches the quasi-contractual remedy of unjust enrichment beyond its limits.

Accordingly, the Court should dismiss Count III in its entirety, with prejudice.

ARGUMENT

1. McAvoy wrongly argues that he has an unconditional right to plead an unjust enrichment claim in the alternative.

Relying on general pleading rules, McAvoy asserts that he can "plead both" a breach of contract claim and an unjust enrichment claim, even though he "may not be able to recover under both theories." (Opp'n at 7.) Although McAvoy correctly states the general rule, he implicitly and wrongly argues that the right to plead an “alternative” unjust enrichment claim is unconditional. As the Third Circuit and numerous Pennsylvania district courts have held, however, unjust enrichment claims cannot be alleged—even in the alternative—where (a) the rights at issue are governed by contracts, and (b) the existence and validity of those contracts are not in dispute. *See Grudkowski v. Foremost Ins. Co.*, 556 F. App’x 165, 170 (3d Cir. 2014).

McAvoy ignores this exception to the rule he cites. He does not address the *Grudkowski* decision, or any of the other numerous Pennsylvania district court decisions that reinforce this point. Instead, he cites three inapposite cases, asserting that they support his alternative cause of action theory. He is wrong; none of the cases support his claim.

In *Bill Goodwin Const., LLC v. Wondra Const., Inc.*, this Court simply reaffirmed the general rule that breach of contract claims and unjust enrichment claims may be pleaded in the alternative. No. 3:13CV157, 2014 WL 1415078, at *10 (M.D. Pa. Apr. 10, 2014). The Court did not address the exception on which VanGavree relies because the defendant Wondra Construction—unlike VanGavree here—did not concede that the “alleged oral contracts” were valid and enforceable. (*See* Wondra’s Brief in Support of Motion to Dismiss, which is attached as Ex. A at 9–10.)

The *Spuhler* and *Lugo* decisions of the Superior Court of Pennsylvania also do not support McAvoy's position. In *Spuhler*, there is no indication that the defendant admitted that the contract was enforceable, and, in any event, not all of rights at issue were necessarily governed by the alleged contract. *Spuhler v. Massachusetts Mut. Life Ins. Co.*, No. 911 MDA 2014, 2015 WL 5970490, at *5 (Pa. Super. Ct. Oct. 1, 2015). In *Lugo*, like in *Bill Goodwin*, the defendant did not argue for dismissal because it admitted to the contracts, it argued instead that the unjust enrichment claim should be dismissed simply because plaintiff's other claims were premised on an alleged contract. *See Lugo v. Farmers Pride, Inc.*, 2009 PA Super 5, ¶ 15, 967 A.2d 963, 969 (2009).

Accordingly, the general rules permitting "alternative" causes of action do not save McAvoy's unjust enrichment claim against VanGavree. Where—as here—"the validity of the contract between the parties is not in question," a party "may not pursue [an] unjust enrichment claim," and the claim should be dismissed. *Moore v. Angie's List, Inc.*, 118 F. Supp. 3d 802, 820 (E.D. Pa. 2015).

2. McAvoy does not plead an "alternative" unjust enrichment claim premised on extra-contractual rights.

McAvoy next argues that his unjust enrichment claim against VanGavree should survive because "courts will not dismiss unjust enrichment claims when there is doubt as to whether the contract governs the transaction at issue." (Opp'n at 8.) The problem for McAvoy is that—unlike the plaintiff in the *Ruthrauff* case he cites—McAvoy does not plead that the rights he seeks to enforce fall outside of the contracts at issue. *See Ruthrauff, Inc. v. Ravin, Inc.*, 914 A.2d 880, 893 (Pa. Super. Ct. 2006) ("In the instant case, Ruthrauff made its claim for unjust enrichment for work it performed outside any promises made in the written contractual documents. . . ."). Instead, McAvoy alleges that the contracts apply, but pursues an unjust enrichment theory in case "the Court determines that there were no ***breaches***" of those contracts. (Compl. ¶ 60 (emphasis added).) Such allegations do not state an unjust enrichment claim, which must be premised on the non-existence of a contract, not a lack of a breach. *Villoresi v. Femminella*, 856 A.2d 78, 83 (Pa. Super. Ct. 2004) ("Where an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist.").

Moreover, even if he had tried, McAvoy could not plausibly state an extra-contractual right to the commission payments he seeks because his right to those payments indisputably arise solely from the contracts at issue. Paragraph 46 of the Complaint—upon which McAvoy wrongly relies for support (Opp'n at 8-9)—underscores this point. Therein, McAvoy alleges that he is entitled to certain commissions because the disputed revenue "accrues to Target of PA and must be included in an distribution to McAvoy." (Compl. ¶ 46.) Of course, his right to certain distributions from TISP arises solely from the Operating Agreement, which the remainder of Paragraph 46 makes clear. (*See id.* (alleging that certain wrongdoing was done "to intentionally reduce what VanGavree must pay to McAvoy ***under the parties' Operating Agreement***." (emphasis added).)

Simply put, McAvoy does not allege that the commissions and sums he seeks are anything other than the percentages of TISP's revenue that he was owed under the Operating Agreement and Commission Rights Agreement. Therefore, McAvoy has not alleged a viable "alternative" unjust enrichment claim against VanGavree and the claim should be dismissed.

3. Admitting to the existence and validity of the contracts in a motion to dismiss is sufficient to defeat an "alternative" unjust enrichment claim.

Citing no legal authority whatsoever, McAvoy asserts that his claim against VanGavree should survive because "VanGavree has only first acknowledged the existence and validity of the agreements in the motion to dismiss." (Opp'n at 9.) This argument misses the mark. Pennsylvania district courts routinely dismiss unjust enrichment claims on pre-answer Rule 12 motions where defendants admit to the existence and validity of contracts in their moving papers. *See, e.g., Rice v. Electrolux Home Prod., Inc.*, No. 4:15-CV-00371, 2015 WL 4545520, at *7-8 (M.D. Pa. July 28, 2015) (dismissing an alternative unjust enrichment claim because the defendant Electrolux stated in its motion that "there is no dispute that a valid express warranty exists”). McAvoy’s claim against VanGavree for unjust enrichment should therefore be dismissed with prejudice.[1]

4. Despite clarifying part of his claim, McAvoy still lacks standing to sue AffinityLTC directly.

McAvoy alleges that he conferred benefits on AffinityLTC “in the form of” (a) revenue that was “wrongly diverted” from TISP to AffinityLTC, and (b) TISP’s payment of expenses that belonged to AffinityLTC. (Compl. ¶ 63.) AffinityLTC construed the former allegation as a claim that VanGavree wrongly sold policies under AffinityLTC that should have been sold under TISP. (*See* Br. In Supp. of Mot. to Dismiss at 10–11.) McAvoy now clarifies that he is asserting that the policies *were* sold through TISP, but that VanGavree intentionally treated them as if they were sold by AffinityLTC.[2] (Opp’n at 11.) But the clarification changes nothing—McAvoy still lacks standing to sue AffinityLTC directly.

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[1] McAvoy states that there is “simply no basis” to dismiss the unjust enrichment claim with prejudice, calling VanGavree’s request for such a dismissal “incredible.” (Opp’n at 9, n.13.) However, dismissal with prejudice is proper when granting leave to amend would be futile, and McAvoy does not assert that an amended complaint could cure the asserted deficiencies. *See Bainbridge v. Ocwen Loan Servicing, LLC,* No. 3:16-CV-0411, 2017 WL 1178047, at *24 (M.D. Pa. Mar. 30, 2017). No amendment could cure the deficiencies in light of the established authority discussed herein.

[2] McAvoy accuses AffinityLTC of “intentionally . . . distort[ing]” the claim to support its dismissal. Nothing of the sort occurred. The claim is vaguely pleaded, and AffinityLTC believed that “diverted revenue” meant that VanGavree diverted insurance business away from TISP. McAvoy’s clarification confirms that

First, McAvoy argues that he has standing to sue AffinityLTC for the "wrongly diverted" revenue because he is seeking to enforce "his personal right to a specifically-defined share of Target of PA's revenue and profits." (Opp'n at 13.) But despite having a contractual right to certain percentages of TISP's revenue, the claim against ***AffinityLTC*** remains derivative of an injury to TISP. In effect, McAvoy claims that VanGavree misappropriated TISP's funds, which had the downrange effect of depriving him of distributions he would have otherwise received under the Operating Agreement. Such an injury is indirect and dependent on the injury sustained to TISP. Only TISP has the right to claw back its funds from third parties that were allegedly misappropriated by one of its members; another member of that limited liability company does not. *See*, *generally*, *Amber Pyramid, Inc. v. Buffington Harbor Riverboats, L.L.C.*, 129 F. App'x 292, 294 (7th Cir. 2005) ("shareholders lack standing to sue third parties for indirect damages resulting from injuries to corporations").

Second, McAvoy's lack of standing to sue for the "wrongfully paid expenses" is even more apparent. McAvoy alleges that VanGavree caused TISP to pay expenses incurred by AffinityLTC (or VanGavree). (Compl. ¶ 63.) Therefore, as McAvoy's own allegations show, the injury, if any, is to TISP. McAvoy does

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his entire Complaint rests on the premise that he did not receive commission payments that he claims he was owed under the contracts.

not gain standing simply because he claims that a portion of those funds may have been later distributed to him under the Operating Agreement.

Third, McAvoy's reliance on the Pennsylvania Uniform Liability Company Act of 2016 is misplaced.[3] Section 8881, on which McAvoy relies, describes when "a member may maintain a direct action ***against another member, a manager or the limited liability company*** to enforce the member's rights and protect the member's interests." 15 Pa.C.S. § 8881 (West) (emphasis added). The 2016 Committee Comment explains that such a right exists when the company's manager fails to distribute cash to the member as the operating agreement requires. Here, McAvoy has done just that—he has sued VanGavree directly. But Section 8881 does not authorize direct claims ***against the non-members*** that allegedly received the company's funds as a result of a manager's misappropriation. That injury to the company must be enforced by the company itself or in a derivative action. *See generally*, *id.* at § 8882. McAvoy's contention that his suit against non-member AffinityLTC is "comparable" to a direct suit against a member or manager is wrong. (Opp'n at 14.).

For years, McAvoy enjoyed the benefits and protections afforded to him under the laws governing membership in a limited liability company. He cannot now disregard those laws simply because they make his present endeavor more difficult. Because he does not have standing to sue AffinityLTC directly for VanGavree's alleged misappropriation of TISP's funds, his unjust enrichment claim should be dismissed.

5. McAvoy's claim that he indirectly conferred benefits on AffinityLTC stretches the quasi-contractual remedy of unjust enrichment beyond its limits.

Lack of standing aside, McAvoy argues that he has stated a valid unjust enrichment claim against AffinityLTC because the claim is inherently fact-specific and does not require that he confer benefits "directly" on AffinityLTC. (Opp'n at 14-16.) The argument misses the point—McAvoy did not confer any benefits on AffinityLTC, indirectly or otherwise. The benefits he cites—a capital contribution and access to Managing General Agency contracts (Opp'n at 16.)—were conferred on TISP, not AffinityLTC. The fact that he believes that he would have received a distribution of a portion of TISP's allegedly misappropriated funds does not mean that he indirectly conferred benefits on the person or entity that allegedly received those funds. None of the cases cited by McAvoy support such a theory, and indeed, the *Lefta Associates* case cited by McAvoy recognizes that the remedy has its limits. *See Lefta Assocs. v. Hurley*, 902 F. Supp. 2d 559, 590 (M.D. Pa. 2012)

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[3] The Act was not effective until April 1, 2017. 15 Pa. C.S.A. § 8811. Regardless, for the reasons stated above, it does not support standing to sue

(dismissing an unjust enrichment claim on summary judgment because the link between plaintiffs and the alleged benefit conferred was "too attenuated.")

McAvoy's entire Complaint rests on the premise that he did not receive the distributions from TISP to which he was contractually entitled as a member of TISP. The remedy of unjust enrichment does not afford him the ability to sue, in his individual capacity, non-members of the LLC that he believes received some of the funds that would have otherwise been distributed to him. McAvoy's theory stretches the remedy of unjust enrichment beyond its limits and therefore, for this additional reason, the claim against AffinityLTC should be dismissed.

CONCLUSION

Based on the foregoing and the arguments made in the opening brief, Michael S. VanGavree and AffinityLTC, LLC request that the Court grant their motion and dismiss Count III of the Complaint in its entirety, with prejudice.

AffinityLTC.

Respectfully submitted,

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Dated: April 10, 2017

CERTIFICATE OF SERVICE

I, BRIAN M. ROBINSON, hereby certify that on this 10th day of April 2017, a true and correct copy of the foregoing Reply Brief in Support of the Motion to Dismiss Count III of the Complaint was filed with the Court and served on the following via operation of the Court's CM/ECF system:

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